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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 42806
Plaintiff-Appellate,)	
)	NEZ PERCE CNTY NO. CR 2014-3285
v.)	
)	
BRIAN E. NEAL,)	RESPONDENT'S BRIEF
)	
Defendant-Respondent.)	

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BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF NEZ PERCE

HONORABLE JEFF M. BRUDIE
District Judge

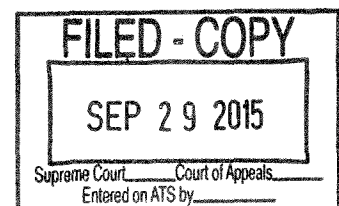
SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ERIC D. FREDERICKSEN
Deputy State Appellate Public Defender
I.S.B. #6555
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-RESPONDENT

ATTORNEY FOR
PLAINTIFF-APPELLANT



Y9103

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STATEMENT OF THE CASE

Nature of the Case

The State appeals following the district court's order granting Brian Neal's motion to suppress wherein the district court held that Officer Yount unlawfully extend the scope and duration of his stop of Mr. Neal's vehicle and there were "insufficient facts to support a reasonable suspicion of drug activity." For the reasons set forth herein, the State has failed to show error in the district court's conclusion that Officer Yount unconstitutionally extended the investigatory detention of Mr. Neal longer than necessary to effectuate the stop without his consent, in violation of the Fourth Amendment of the United States Constitution and Article I, § 17 of the Idaho Constitution.

Statement of the Facts and Course of Proceedings

On April 24, 2014, at around midnight, Officer Ken Yount had initiated a traffic stop on a vehicle, and as he completed the engagement, he observed an unoccupied black Pontiac Bonneville and its "windows appeared to be very dark." (Prelim. Tr., p.6, L.19 – p.7, L.13.)¹ Officer Yount drove down the street from the Pontiac to conduct stationary patrol. (Prelim. Tr., p.7, Ls.16-21.) Approximately 40 minutes later, Officer Yount observed the Pontiac and began tailing the vehicle. (Prelim. Tr., p.7, L.23 – p.8, L.4.) After the vehicle failed to signal as it merged onto westbound U.S. 12, Officer Yount continued to follow it, waiting to find a better location to initiate a traffic stop.

¹ There are two separate transcripts in the appellate record. For ease of reference, the transcript of the 5/14/14 preliminary hearing is cited herein as "Prelim. Tr." while the transcript containing the 10/31/14 suppression hearing and the 12/3/14 motion to reconsider hearing is cited herein as "Tr."

(Prelim. Tr., p.8, Ls.1-19.) Soon thereafter, Officer Yount stopped the vehicle in the parking lot of a Jack in the Box fast food eatery. (Prelim. Tr., p.8, Ls.11-19.)

Upon approaching the vehicle, within two minutes of the stop, Officer Yount requested and obtained Mr. Neal's driver's license and proof of insurance.² (See Video at 12:41:29 – 12:43:30.) Then, a little over two minutes into the stop, Officer Yount inquired as to why Mr. Neal was in Lewiston, why he was sweating, and why he seemed anxious. (R., pp.172-173.) Next, the following colloquy occurred:

Yount: OK. How come you're so anxious here?

Neal: I don't know. You [inaudible] get pulled over, it's like, you know.

Yount: OK.

Neal: Makes you seem anxious

Yount: You do seem anxious to me. All the property in the car belongs to you?

Neal: Everything.

Yount: Any weapons or firearms in the car?

Neal: Absolutely not.

Yount: OK. What's on your shirt there?

Neal: Space Needle.

Yount: OK. Looks like a marijuana leaf there.

Neal: Something like that.

Yount: Yeah. Do you promote marijuana?

Neal: No, I don't promote it. I don't think that it should be illegal, but I don't take it. I don't partake. I don't care either way. It doesn't matter to me. I like Seattle. I lived there for like 16 years.

Yount: OK. Is there any marijuana in the car?

² The insurance card Mr. Neal had provided was expired.

Neal: Absolutely not.

Yount: OK. And you didn't have that more current insurance card?

Neal: No, it's in the mail probably. I'm up to date.

Yount: OK. You still seem to be sweating there in the face.

Neal: Yeah, I know it's cause I'm hot. I got my hat on. Take my hat off.

Yount: It's pretty cool out here.

Neal: I know it feels good out there.

Yount: So you're saying that there's noth ...

Neal: [Inaudible].

Yount: You're saying there's nothing illegal in the car at all?

Neal: No there's nothing illegal in the car.

Yount: And your anxiety is because you got ...

Neal: Yeah. I do take anxiety meds.

. . .

Yount: When we finish up here will you let me search your car?

Neal: No, no, no I don't really want you to search my car.

Yount: OK. Well, I think, you know, based on how you're acting I think there's something in the car you shouldn't have. Is there any reason a narcotics k9 will alert to anything?

Neal: No. No.

Yount: OK. Well I'm gonna go request one come out here.

Neal: Alright.

Yount: OK. Any paraphernalia or anything?

Neal: Nope.

Yount: OK. Now you're starting to breathe heavier.

Neal: Sir, you're giving me the third degree. I don't have nothing wrong with me.

Yount: I'm just asking you simple questions, and you're beginning to sweat more from your face.³

(R., pp.13-15; Video at 12:44:20 – 12:48:58.)

Officer Yount then ordered Mr. Neal out of the vehicle and made him stand in front of his police cruiser. (Video at 12:47:30.) Officer Yount called Mr. Neal's information into dispatch and requested backup. (Prelim. Tr., p.14, Ls.9-24.) Officer Yount also requested a K-9 police unit, but, at about 15 minutes into the stop, learned that the K-9 officer was off duty and had been sleeping and would need some additional time prior to arrival. (Video at 12:53:40 – 12:55:10.) When the K-9 officer asked how long Officer Yount had been on the stop, Officer Yount was less than honest, stating, "about 5 now." (Video at 12:54:53.) Officer Yount then spent a significant amount of time attempting to determine whether Mr. Neal's probation out of the state of Washington would give him the ability to search Mr. Neal's vehicle. (Video at 12:47:32 – 1:02:30.) The K-9 unit arrived on the scene at 1:07 a.m., approximately 26 minutes after the vehicle had been stopped. (Prelim. Tr., p.18, Ls.1-3.) Officer Yount then tested

³ As to this comment by Officer Yount, the district court noted,

On the video, Trooper Yount repeatedly asks Neal if he has illegal drugs, firearms, or other weapons in the vehicle and repeatedly asks why he is nervous and sweating. When Neal continuously explains he has an anxiety disorder and is nervous because of the trooper's questions, Yount tells Neal he is just asking him simple questions. The Court finds Yount's response disingenuous. While such questions may be routine for Trooper Yount, to a motorist stopped for a very minor infraction, the repeated questions are understandably perceived, coming from someone in a position of authority, as accusatory and totally unrelated to the reason for the stop.

(R., p.199.)

the tint of the windows, which took which took a little over one minute to complete. (Video 1:09:25 – 1:10:32.) At 1:11:53, the K-9 unit was deployed on the vehicle and the canine purportedly alerted. (Video 1:11:53 – 1:15:00.) It is unclear if any of the actual citations were prepared during the actual stop or until after Mr. Neal's arrest. (R., p.211.)

Officers then searched the vehicle and Mr. Neal was arrested for possession of drug paraphernalia. (R., p.194.) A subsequent search at the Nez Perce County jail uncovered a sock in Mr. Neal's underwear containing "a plastic baggy with a black tar-like substance believed to be heroin, a second plastic baggie that contained a large piece of crystal substance believed to be methamphetamine, and a third plastic baggy with four yellow pills later identified as hydrocodone." (R., p.194.)

Mr. Neal was charged by Information with trafficking in heroin and possession of a controlled substance with intent to deliver. (R., pp.94-95, 115-116.) Defense counsel for Mr. Neal filed a motion to suppress and supporting memorandum, arguing that: (1) Officer Yount did not have reasonable articulable suspicion to detain Mr. Neal after his initial investigation into the traffic citations; (2) Officer Yount did not possess any reasonable suspicion of drug trafficking to prolong Mr. Neal's detention to wait for a drug detection dog; and (3) Officer Yount violated Mr. Neal's Fourth Amendment rights by unlawfully prolonging the detention. (R., pp.117-119, 127-148.)

The district court agreed, first finding it "troubling that Trooper Yount's actions at the time of the stop are inconsistent with his articulated suspicion and that a review of the video belies the trooper's description of Neal's physical appearance and behavior." (R., pp.198-199.) Rather, the district court found that "[o]n the video, Neal exhibits no jittery behavior and is instead seen standing quite still for a significant period of time."

(R., p.199.) Next, the district court observes that “Trooper Yount testified he suspected Neal was driving under the influence of drugs, yet he took no investigative action to confirm or dispel his suspicion” until after Mr. Neal was arrested. (R., p.199.) The district court concluded that “Trooper Yount requested an off-duty K-9 unit respond on what can only be characterized as hunch or speculation in order to provide some basis to perform a warrantless and presumptively unreasonable search.” (R., p.199.) Based upon its view of the facts presented and Officer Yount’s credibility, the district court held that “there were insufficient facts to support a reasonable suspicion of drug activity” and “Trooper Yount unlawfully extended the stop to buy time for a narcotics dog to arrive in hopes of confirming a speculative hunch that Neal possessed drugs.” (R., p.200.) As a result, the district court granted Mr. Neal’s motion to suppress. (R., p.201.)

The State filed a Notice of Appeal. (R., pp.221-223.)

ISSUE

Has the State failed to show error in the district court's conclusion that Officer Yount unconstitutionally extended the investigatory detention longer than necessary to effectuate the stop without Mr. Neal's consent, in violation of the Fourth Amendment of the United States Constitution and Article I, § 17 of the Idaho Constitution?

ARGUMENT

The State Has Failed To Show Error In The District Court's Conclusion That Officer Yount Unconstitutionally Extended The Investigatory Detention Longer Than Necessary To Effectuate The Stop Without Mr. Neal's Consent, In Violation Of The Fourth Amendment Of The United States Constitution And Article I, § 17 Of The Idaho Constitution

A. Introduction

After Mr. Neal was stopped for a rather innocuous lane change violation and suspicion that the tinting on the windows of his vehicle was too dark, Officer Yount interrogated Mr. Neal in an attempt to search Mr. Neal's vehicle. After Mr. Neal refused to consent to a search of his vehicle, Officer Yount then spent a significant amount of time investigating whether he could use Mr. Neal's probation in Washington to circumvent the warrant requirement of the Fourth Amendment and Article I, § 17 of the Idaho Constitution.

Again failing, Officer Yount delayed his official duties to wait for the arrival of a K-9 unit to conduct a sniff on the vehicle. In granting the motion to suppress and finding that "Officer Yount extended the stop to buy time for a narcotics dog to arrive in hopes of confirming a speculative hunch that Neal possessed drugs[,]" the district court openly questioned the Officer Yount's veracity and condemned his treatment of Mr. Neal during the extended stop.

B. Relevant Jurisprudence And Standards Of Review

In reviewing an order denying a motion to suppress evidence, Idaho appellate Courts apply a bifurcated standard of review: the Court will accept the trial court's findings of fact, unless they are clearly erroneous, but the Court will freely review the trial court's application of constitutional principles to the facts found. *State v. Purdum*, 147 Idaho 206, 207 (2009). "The Court accepts the trial court's findings of fact if

supported by substantial evidence.” *State v. Watts*, 142 Idaho 230, 234 (2005). The Court “has defined ‘substantial evidence as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance.’” *Id.* (quoting *Evans v. Hara’s, Inc.*, 123 Idaho 473, 478 (1993)). “At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence and draw factual inferences is vested in the trial court.” *State v. Hunter*, 156 Idaho 568, 570 (Ct. App. 2014). The Court exercises free review of “the trial court’s application of constitutional principles to the facts found.” *State v. Danney*, 153 Idaho 408 (2012). “Where the lower court reaches the correct result by an erroneous theory, this Court will affirm the order on the correct theory.” *State v. Russo*, 157 Idaho 299, 307 (2014) (quoting *Nampa & Meridian Irrigation Dist. v. Mussell*, 139 Idaho 28, 33 (2003)).

The Fourth Amendment of the United States Constitution and Article 1, § 17 of the Idaho Constitution prohibit unreasonable searches and seizures. Warrantless searches are *per se* unreasonable and thus, violations of the Fourth Amendment. *State v. Weaver*, 127 Idaho 288 (1995). However, the state may rebut this presumption by establishing that a warrantless search either fell within a well-recognized exception to the warrant requirement, or was otherwise reasonable under the circumstances. *Weaver*, 127 Idaho at 290. If evidence is not seized pursuant to a recognized exception to the warrant requirement, the evidence discovered as a result of the illegal search must be excluded as the “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471 (1963).

C. The Duration Of The Traffic Stop Was Unlawfully Extended While Officer Yount Waited For The Drug Detection Dog To Arrive To Accommodate His Hunch

The stop of a vehicle constitutes a seizure of the occupants that implicates the Fourth Amendment guarantee against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Law enforcement may stop a person for a brief, investigatory detention if the officer has an objectively reasonable, articulable suspicion that the vehicle is being driven contrary to traffic laws, or that the vehicle or occupant has been, or is about to be, involved in criminal activity. *United States v. Cortez*, 449 U.S. 411 (1981) (citations omitted); *State v. Gutierrez*, 137 Idaho 647, 650 (Ct. App. 2002) (citations omitted); *State v. McCarthy*, 133 Idaho 119 (Ct. App. 1999) (citations omitted). “The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect.” *Florida v. Royer*, 460 U.S. 491, 500 (1983). “[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Id.* “Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.” *Id.* (citations omitted). “It is the State’s burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.” *Id.*

The United States Supreme Court unequivocally has asserted that, “reasonable suspicion of criminal activity warrants a **temporary seizure for the purpose of questioning limited to the purpose of the stop.**” *Royer*, 460 U.S. at 498 (emphasis added). It is well established that an investigative detention “must be temporary and last no longer than is necessary to effectuate the purpose of the stop,” and a citizen “may not be detained even momentarily without reasonable, objective grounds for doing

so.” *Gutierrez*, 137 Idaho at 651-52 (citing *Royer*, 460 U.S. at 498, 500). Furthermore, although the stop of the vehicle may be of short duration, if the continued detention of the driver unreasonably extends beyond the length necessary for the purpose of the stop, the continued detention of the driver without any reasonable suspicion to support such inquiry is violative of the Fourth Amendment. *Id.*, at 652 (citing *United States v. Guzman*, 864 F.2d 1512, 1519-20 (10th Cir. 1988) (*overruled on other grounds by United States v. Botero-Ospino*, 71 F.3d 783, 787 (10th Cir. 1995)); *United States v. Valdez*, 267 F.3d 395, 398 (5th Cir. 2001)).

Most recently, the United States Supreme Court reiterated, in the context of the stop resulting in a dog sniff, “[t]he critical question then, is not whether the dog sniff occurs before the officer issues a ticket . . . but whether conducting the sniff ‘prolongs’—*i.e.*, adds time to—‘the stop[.]’” *Rodriguez v. United States*, 135 S.Ct. 1609, 1616 (2015); *see also State v. Ramirez*, 145 Idaho 886, 890 (Ct. App. 2008) (“The [Supreme] Court emphasized that the stop was not lengthened by the use of the dog”) (discussing the decision in *Illinois v. Caballes*, 543 U.S. 405, 409 (2005)). In *Rodriguez*, the United States Supreme Court explained: “Like a *Terry* stop,⁴ the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s ‘mission’—to address the traffic violation that warranted the stop and attend to related safety concerns.” *Id.* (internal citations omitted). The Court reiterated that “[b]ecause addressing the infraction is the purpose of the stop, [the detention] may ‘last no longer than is necessary to effectuate th[at] purpose. Authority for the seizure thus ends when tasks tied to the infraction are—or reasonably should have been—completed.” *Id.* (internal citations omitted). The Court recognized that an officer “may conduct certain unrelated

⁴ *See Terry v. Ohio*, 392 U.S. 1 (1968).

checks during an otherwise lawful stop. But . . . he may not do so in a way that prolongs the stop absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” *Id.* (internal citations omitted).

In *Rodriguez*, “[t]he Government argue[d] that an officer may ‘incremental[ly]’ prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances” *Rodriguez*, 135 S.Ct. at 1616. However, the Supreme Court rejected that argument:

The Government’s argument, in effect, is that by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation. The reasonableness of a seizure, however, depends on what the police in fact do. . . . If an officer can complete traffic-based inquiries expeditiously, then that is the amount of “time reasonably required to complete [the stop’s] mission.” As we said in *Caballes* and reiterate today, a traffic stop “prolonged beyond” that point is “unlawful.” The critical question then, is not whether the dog sniff occurs before the officer issues a ticket, . . . but whether conducting the sniff “prolongs”—*i.e.*, adds time to—“the stop[.]”

Id. (internal citations omitted).

On appeal, the State reargues the facts presented to the district court to this Court, now seeking the opposite result. However, the district court’s legal conclusion was based in large part on its view of Officer Yount’s veracity and ulterior motive to search Mr. Neal’s vehicle rather than complete his constitutionally permissible duties as a state trooper with the Idaho State Police. In fact, the district court described Officer Yount’s statement that he was just asking simple questions as “disingenuous,” found it “troubling” that Officer Yount’s actions at the time of the stop were inconsistent with “his articulated suspicion,” and most importantly, that the Court’s “review of the video belies the trooper’s description of Neal’s physical appearance and behavior.” (R., pp.198-

200.) Thus, the district court's legal conclusion, that Officer Yount's extended detention was not supported by sufficient facts "to support a reasonable suspicion of drug activity" is based upon its view of Officer Yount's credibility and assessment of factual inferences in the case, all of which is vested in the trial court. *Hunter*, 156 Idaho at 570 ("At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence and draw factual inferences is vested in the trial court.").⁵

The State also argues that the district court failed to consider that Officer Yount became aware Mr. Neal was on probation in Washington and "[a] restriction on travel outside of the jurisdiction of probation is a common condition of probation." (Appellant's Brief, p.9 (emphasis added).) The State also writes, "And not only was a geographic restriction in fact a condition of Neal's probation, based on that condition, it *appears* that Neal was violating his probation by being in the state of Idaho." (Appellant's Brief, p.9.) Thus, based on not one, but two assumptions, the State argues, "That Sergeant Yount had encountered Neal outside of the jurisdiction of his probation objectively provided the officer with 'the reasonable suspicion ordinarily demanded to justify detaining an individual,' allowing the officer to expand his investigation into potential probation violations." (Appellant's Brief, p.9.)

Aside from the fact that the State is asking this Court to find an officer's unknown hunches amounts to reasonable suspicion, contrary to established precedent, the State

⁵ While the State does appear to argue that the district court's factual finding that the video did not support Officer Yount's description of Mr. Neal's physical appearance and behavior based upon its own view of the video, without the benefit of viewing Officer Yount's in court testimony, the State fails to cite to authority for its proposition. As such, by foregoing its opportunity to present argument or authority as to the merits of its claim, the State has waived any objection that it may have had to the merits its claim of a clearly erroneous factual finding by the district court, although ultimately meritless. See *State v. Zichko*, 129 Idaho 259, 263 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking....")

cites to no authority for its assumption that Officer Yount would have any authority, much less jurisdiction, to enforce the terms of Mr. Neal's *Washington* probation. See *State v. Zichko*, 129 Idaho 259, 263 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking..."). In addition, the State has not offered any evidence that Mr. Neal failed to get permission from his probation officer to travel outside of the state of Washington, if that is in fact required by his probation agreement. Even more troubling, in an attempt to manufacture a reason to search Mr. Neal's vehicle, Officer Yount devotes a large portion of his time to investigating the terms of Mr. Neal's probation, when he could have been completing Mr. Neal's citations⁶ or measuring the vehicle's window tint.

Accordingly, in light of the reasons set forth in the district court's order granting Mr. Neal's and as argued herein, the State has failed to show error in the district court's order granting Mr. Neal's motion to suppress.

CONCLUSION

Mr. Neal respectfully requests that this Court affirm the district court's order granting Mr. Neal's motion to suppress.

DATED this 29th day of September, 2015.


ERIC D. FREDERICKSEN
Deputy State Appellate Public Defender

⁶ Officer Yount testified that it takes four or five minutes to write a citation for no insurance. (Tr., p.24, Ls.16-18.)

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of September, 2015, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

BRIAN E NEAL
1150 WALL ST
LEWISTON ID 83501

JEFF M BRUDIE
DISTRICT COURT JUDGE
E-MAILED BRIEF

GREGORY HURN
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010

Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read 'EAS', with a long horizontal line extending to the right.

EVAN A. SMITH
Administrative Assistant

EDF/eas